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No. 455

In the Supreme Court of the United States

April Term, 1931.

ANNIE G. PHILLIPS, *ET AL.*, *Petitioners*,

vs.

COMMISSIONER OF INTERNAL REVENUE.

MOTION OF JAMES C. DENTON AND RICHARD H. WILLS FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*, AND BRIEF OF *AMICI CURIAE*.

JAMES C. DENTON,
RICHARD H. WILLS,
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IN THE SUPREME COURT OF THE UNITED STATES.

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No. 455

ANNIE G. PHILLIPS, *ET AL.*, *Petitioners*,

vs.

COMMISSIONER OF INTERNAL REVENUE.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

May It Please the Court:

The undersigned, as counsel for Mid-Continent Petroleum Corporation, a corporation, respectfully move this Honorable Court for leave to file the accompanying brief in this case, as *Amici Curiae*.

JAMES C. DENTON,
RICHARD H. WILLS,
Counsel for Mid-Continent Petroleum Corporation, a Corporation, as Amici Curiae.

IN THE SUPREME COURT OF THE UNITED STATES.

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No. 455

ANNIE G. PHILLIPS, *ET AL., Petitioners,*

vs.

COMMISSIONER OF INTERNAL REVENUE.

BRIEF OF JAMES C. DENTON AND RICHARD H. WILLS, AS *AMICI CURIAE*.

I.

Preliminary Statement.

The principal question involved in the above entitled cause is whether section 280 of the Revenue Act of 1926 (26 U. S. C. A., Sec. 1069) is constitutional, and the *amici curiae* are particularly interested in the aforesaid question by reason of their being attorneys for the appellee in cause No. 143 in the United States Circuit Court of Appeals for the Tenth Circuit, wherein A. C. Alexander and A. C. Alexander, as Collector of Internal Revenue for the United

States for the District of Oklahoma, is appellant, and Mid-Continent Petroleum Corporation, a corporation, is appellee; and in which said cause No. 143 the aforesaid question, to-wit, the constitutionality of section 280 of the Revenue Act of 1926, is the principal question before the Court. The aforesaid cause No. 143 was commenced in the United States District Court for the Western District of Oklahoma, and on June 15, 1929, said District Court rendered an opinion holding that the aforesaid section 280 of the Revenue Act of 1926 was unconstitutional, which said opinion is reported in 35 Fed. (2d) 43. Thereafter an appeal was prosecuted in said cause to the Tenth Circuit Court of Appeals, and on the 4th day of February, 1930, said appeal was submitted to said Circuit Court of Appeals upon oral arguments and printed briefs. To this date, however, no disposition has been made of the aforesaid appeal, which *amici curiae* believe is attributable to the pendency of the case at bar, the disposition and determination of which will determine and govern the Tenth Circuit Court of Appeals in its disposition of the aforesaid appeal.

II.

ARGUMENT.

Summary of Argument.

The following is a summary of the argument which will hereinafter be presented:

Point A: Section 280 of the Revenue Act of 1926 has repeatedly been held invalid.

Point B: The rights of the government, without the aforesaid section 280, are amply protected.

Point C: The specific constitutional objections to the aforesaid section 280 are:

(1) The aforesaid section 280 is in violation of Constitution, Art. 3, Sec. 1, vesting all judicial powers in the courts, and Sec. 2, providing that the judicial power shall extend to all cases in law and equity and to controversies to which the United States shall be a party.

(2) The aforesaid section 280 is in violation of Constitution, Amend. 5, requiring due process of law.

(3) The aforesaid section 280 is in violation of Constitution, Amend. 7, guaranteeing the right of trial by jury in suits at common law.

(4) The aforesaid section 280 is bad for uncertainty.

(5) If the aforesaid section 280 be regarded as authorizing a tax, then it is in violation of Constitution, Art. 1, Sec. 2, clause 3, requiring direct taxes to be apportioned, and not within Amend. 16, authorizing income taxes without apportionment.

Point D: The government's cases distinguished.

Point E: Criticism of the opinion in the case of *Routzahn* v. *Tyroler*.

Point F: Criticism of the opinion of the Circuit Court of Appeals in the case at bar.

Point G: The *Old Colony* case is not in point.

Point A.

Section 280 of the Revenue Act of 1926 Has Repeatedly Been Held Invalid.

Aside from the case at bar and the case of *Routzahn* v. *Tyroler*, 36 Fed. (2d) 208, no court has affirmed the constitutionality of section 280 of the Revenue Act of 1926, which attempts to vest in the Commissioner of Internal Revenue the jurisdiction and power to determine and assess the "liability at law or in equity," if any, of a transferee of property of a taxpayer in respect of the tax imposed upon the taxpayer by the Revenue Acts. And in those cases, which we will later discuss at length, the statute was tested by only the 5th Amendment. On the other hand, the section has been held unconstitutional, or the opinion that it is unconstitutional pretty clearly expressed, in the following cases:

Owensboro Ditcher & Grader Co. v. *Lucas*, 18 Fed. (2d) 798;

Felland v. *Wilkinson*, 33 Fed. (2d) 961;

Mid-Continent Petroleum Corp. v. *Alexander*, 35 Fed. (2d) 43;

Nauts v. *Clymer*, Northern Dist. Ohio, oral opinion, not reported;

Tyroler v. *Routzahn*, Northern Dist. Ohio, not reported;

Cappellini Case, 14 B. T. A. 1269 (certain opinions in).

Moreover, the statute's invalidity has been tacitly admitted by the government in numerous ways: *(1)* By the

voluntary dismissal of the government's appeal in the *Owensboro* case, *supra; (2)* by Congress' insertion of section 604 in the Revenue Act of 1928, which is an indirect, though futile, attempt to enable the Commissioner of Internal Revenue to enforce section 280, regardless of its unconstitutionality and the decisions of the court to that effect; and, *(3)* by the opinion of the Board of Tax Appeals in the *Capellini* case, 14 B. T. A. 1269.

Point B.

The Rights of the Government, Without the Aforesaid Section 280, Are Amply Protected.

Omitting said sections 280 and 604, the federal law gives the government ample protection in the collection of taxes. If any person liable to pay any tax neglects or refuses to pay the same *after demand*, the amount shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person; U. S. C. A., Title 26, Sec. 115, subdivision *(a)*; but said lien shall not be valid as against any mortgagee, purchaser or judgment creditor until notice thereof has been filed by the collector in accordance with the law of the state or territory in which the property subject to lien is situated, or in the office of the clerk of the United States District Court for the judicial district in which the property subject to the lien is situated. U. S. C. A., Title 26, Sec. 115, subdivision *(b)*. And the failure of the government, through its administrative or executive branch, to collect its tax from the taxpayer or to avail itself of such statutory

lien on the taxpayer's property does not always leave the government without other remedies. Thus, through the judicial branch, the government, as a creditor, may, under the proper state of facts, enforce in the courts its claim against transferees or purchasers of the taxpayer, or rather against the property of the taxpayer in the possession of such transferee or purchaser, by a creditor's bill or suit for fraudulent conveyance. But such proceedings are suits at law or in equity within the meaning of Constitution, article 3, and are denominated judicial as distinguished from administrative or executive proceedings.

—*United States* v. *Fairall*, 16 Fed. (2d) 328;
Capps Mfg. Co. v. *United States*, 15 Fed. (2d) 528;
Updike v. *United States*, 8 Fed. (2d) 913.

The question of liability at law or in equity of transferees of a taxpayer is treated at length in Klein's Federal Income Taxation, ch. 43, and in an article in 27 Michigan Law Review, p. 39; and such suits at law or in equity which are judicial proceedings, together with the administrative proceedings authorized against the taxpayer above referred to, have always been regarded as sufficient to protect fully the government's rights and interests.

We wish to emphasize by restatement: That said cases at law and equity b r o u g h t by the government against transferees of the taxpayer are strictly judicial proceedings, to which the judicial power of the United States is made to extend by virtue of the Constitution, Art. 3, Sec. 2; that the determination of such cases involves the exercise of the judicial power as distinguished from the legisla-

tive or the executive power of the government; and that the judicial power is, by section 1 of article 3 of the United States Constitution, expressly vested in the Supreme Court and in such inferior courts as Congress may from time to time ordain and establish; and that section 280 of the Revenue Act of 1926 is the first attempt on the part of Congress to do these two things: *(a)* To withdraw from the inferior courts ordained and established by Congress, the jurisdiction and power to determine such cases and controversies (which, for sake of argument, we admit can be done); and *(b)* at the same time to vest in or transfer to the administrative or executive branch of the government the judicial power to hear and determine such cases and controversies, which we say violates section 1 of article 3 of the United States Constitution; or, to put it differently, Congress, by section 280, has attempted to say that the judicial power shall *not* extend to all cases in law and equity and to controversies to which the United States shall be a party (which violates the Const., Art. 3, Sec. 1), but also, which is the chief constitutional vice of section 280, that the executive or administrative branch of the government shall exercise the judicial power, to hear and determine such cases and controversies (which is in contravention of the Const., Art. 3, section 2).

Without discussing the wisdom of the federal Constitution, which distributes and divides the powers of the government into three separate branches, the legislative, the executive and the judicial, it will be the purpose of this brief to show that although Congress has power under the

Constitution to create and define the jurisdiction of inferior federal courts, it cannot, as section 280 attempts to do, say that the judicial power shall *not* extend to all cases in law and equity, and controversies to which the United States is a party; nor can it vest in or transfer to the executive or administrative branch of the government and upon a subordinate officer thereof, here the Commissioner of Internal Revenue, the judicial power to hear and determine such cases and controversies.

Point C.

The Specific Constitutional Objections to Section 280.

We assert that section 280 is unconstitutional for the following reasons:

(1) That it is in violation of Const., Art. 3, Sec. 1, vesting the judicial power in the courts, and Sec. 2, providing that the judicial power shall extend to all cases in law and equity, and to controversies to which the United States shall be a party.

(2) That it is in violation of Const., Amend. 5, requiring due process of law.

(3) That it is in violation of Const., Amend. 7, guaranteeing the right of trial by jury in suits at common law.

(4) That it is so vague and uncertain as to be in violation of the Constitution.

(5) That if it be regarded as authorizing the assessment of a tax, it is in violation of Const., Art. 1, Sec. 2, clause 3, requiring direct taxes to be apportioned, and is not within Const., Amend. 16, authorizing income taxes, since the liability at law or in equity of a transferee is not a liability based on the income of the transferee.

We will now discuss the foregoing objections in the order set out.

Section 280 of the Revenue Act of 1926 is in violation of Const., Art. 3, Sec. 1, vesting all judicial powers in the courts, and Sec. 2, providing that the judicial power shall extend to all cases in law and equity and to controversies to which the United States shall be a party.

Section 1 of article 3 of the Constitution provides:

"The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. * * *"

Section 2 thereof provides:

"The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; * * * to controversies to which the United States shall be a party; * * *."

The pertinent part of section 280 of the Revenue Act of 1926 reads as follows:

"The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected and paid in the same manner and subject to the same provisions and limitation as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds).

"*(1)* The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts and additions to the tax provided by law) imposed upon the taxpayer by this title, or by any prior income, excess profits or wars profits tax act."

Sometimes it helps to reveal the true nature of a formula of language to state the same thing in a different way. Accordingly, let us put section 280 in another form, using the "whereas" formula in early English statutes. That will give more clearly the mandate of the statute and its revolutionary purpose as revealed in the report of the Conference Committee of the House and Senate, and the report of the Joint Committee on Internal Revenue Taxation. (See appendix hereto.)

Whereas, it has always been the practice heretofore to enforce the liability of a transferee of the property of a taxpayer by suit at law or in equity, and the practice is annoying to the Department by reason of its requirements of pleadings, jury trials in some cases, and the other safeguards imposed by judicial proceedings in the courts, therefore,

Be it Enacted: That the Commissioner of Internal Revenue, whenever he thinks a transferee of property of a taxpayer is subject to some liability in law or in equity, may determine said liability in any manner he sees fit, or according to such regulations as he desires, and assess said liability so determined against said transferee.

Perhaps we are too generous to the government in putting the statute in this form. There is nothing in the

statute as written which requires the Commissioner to believe even that the liability is a true one, or that requires any regulations or procedure of any kind to determine the liability. As far as the words of the statute go the assessment may be entirely arbitrary.

If this statute be valid it is difficult to see any occasion whatsoever for trial courts. If Congress can transfer the exercise of judicial power, which it says in its Conference Committee Report has always been exercised by the judicial branch of the government in cases at law or in equity, to an administrative officer, why not transfer jurisdiction of all judicial matters to administrative officers, and do away with the expense of trial courts entirely?

Let us see for a moment the nature of the jurisdiction attempted to be conferred on the Commissioner, which: "Prior to the 1926 Act * * * was by a suit at law or in equity." (Joint Committee Report, appendix hereto.)

We leave out of view the situation where the property was subject to a lien for the taxes before the transfer, since we understand there is no claim of lien in this case. So also we might omit any reference to the liability of a transferee who had contracted to pay the taxes, since we understand there is no claim of contract in this case. But in such a case the action would be at law and the transferee would be entitled to a jury. The government would have the burden of establishing the contract and of proving the debt for taxes, which burden, by the amendment of the 1928 Revenue Act, is attempted to be imposed on the transferee. And this situation is interesting in showing in opposition to the con-

tention of the government, that the transferee's liability is not a tax. It is well settled law that if a corporation commits a tort, and then transfers its property to another corporation that assumes to pay all its obligations, the liability of the later corporation is not in tort at all, but wholly on contract.

—*Trena* v. *Chicago, etc., Ry. Co.*, 228 Fed. 824;
Roberts v. *Underwood Typewriting Co.*, 257 Fed. 583;
Mecke v. *Valleytown Mineral Co.*, 93 Fed. 697.

But let us take the precise situation which we understand is involved in the instant case, where the taxpayer transferred property not subject to lien, and where there was no contract to assume the tranferor's liability. As the Joint Committee says, before the attempted invasion of the province of the judiciary, by section 280, it presented a matter wholly for the courts. What was the nature of the proceedings? Let us outline:

(1) It was a suit in equity, based on fraudulent conveyance and the trust fund doctrine.

(2) The venue was in the district of defendant's residence, and not a Washington city office.

(3) The government had the burden of proving

(a) The amount of its tax debt against the transferror;

(b) The value of the property received by the transferee;

(c) That the transferee took with notice of the tax claim.

(4) If there were other transferees, or interested parties, they could be brought in and proportionate liabilities determined.

(5) The decree would not be measured by the amount of the transferor's tax, but by the value of the property fraudulently received by the transferee, and if there were several transferees taking with notice, the liability would be apportioned between them.

(6) If dissatisfied with the decree, the transferee would have an appeal to a court, not a departmental board.

(7) And would have the record of the trial court, not a vague uncertainty, upon which to base the appeal.

(8) The jurisdiction of the appeal would be in a nearby court, and not in a departmental board thousands of miles away.

If the proceedings of this character, which as the Joint Committee says, have always been for the courts, can be transferred to an administrative officer, *then there is nothing in the way of giving to such officers the jurisdiction of all lawsuits. Can anyone imagine any proceedings more distinctly judicial in character than a creditor's suit? They do not exist.*

Can anyone believe that this statute is valid? And very certainly *it cannot be held valid unless we are willing to send to the dump heap one of the most basic of the principles of constitutional government and of our constitutional law.*

We refer, of course, to the principle that the powers of government are divided into three departments, the executive, the legislative and the judicial. This division of governmental powers lies at the foundation of the government, represents a tradition of good government older than the United States, and has always been regarded by this Court and all other courts as a basic principle of constitutional government.

This Court has gone much further than that in limiting the other departments of government in the attempted exercise of judicial authority. The case of *Kilbourn* v. *Thompson*, 103 U. S. 168, 26 L. ed. 377, is an example. There, the House of Representatives, because the United States was a creditor of the bankrupt firm of Jay, Cooke & Company (whose affairs were then being administered in bankruptcy), and because it was conceived that an investigation into "the real estate pool" in the District of Columbia, in which said firm was supposed to have an interest, should be made, authorized a committee to inquire into the nature and history of the pool and other related matters. Kilbourn was called to testify before that Committee. He refused and was eventually sentenced by the House to imprisonment for contempt. He brought this suit against the sergeant-at-arms and others to recover damages for his wrongful imprisonment.

The Court, in upholding his claim, first referred to the division of powers among the three departments of government and the importance of not permitting "the persons entrusted with power in any one of these branches * * * to

encroach upon the powers confided to the others"; and further said:

> "It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers entrusted to governments, whether state or national, are divided into the three grand departments of the executive, the legislative and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.
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> • • • • • • •
>
> "We do not, after what has been said, deem it necessary to discuss the proposition that if the investigation which the committee was directed to make, was one that was judicial in its character and which could only be properly and successfully made by a court of justice, and if it related to a matter in which relief or redress could be had only by a judicial proceeding, that the power attempted to be exercised was one confided by the Constitution to the judicial and not to the legislative department of the government. We think it equally clear that the power asserted is judicial and that it is not legislative."

Here the Court went much further than a holding that no other department could adjudicate upon and enforce rights properly determinable in a court. The holding was

that no other department could exercise the power requisite to an investigation, without adjudication and enforcement, into such matters. To the same effect is *In re Pacific Railway Commission*, 32 Fed. 241, decided by the Circuit Court of California with Mr. Justice FIELD sitting. The liability of a debtor, even to the United States, cannot be established and enforced by legislative act. It requires a judicial determination.

In the case of *Myers* v. *United States*, 52 S. C. Rep. 295, 272 U. S. 118, 71 L. ed. 166, the Court, referring to the Union before the creation of the states, said:

> "Their union under the Confederation had not worked well, as the members of the convention knew. Montisquein's view that the maintenance of independence as between the legislative, the executive and the judicial branches was a security for the people had their full approval. Madison in the Convention, 2 Farrand, Records of the Federal Convention, 56. *Kendall* v. *U. S.*, 12 Pet. 524, 610, 9 L. ed. 1181, 1215. Accordingly, the Constitution was so framed as to vest in the Congress all legislative powers therein granted, to vest in the President the executive power, and to vest in one Supreme Court and such inferior courts as Congress might establish the judicial power. From this division on principle, the reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they were not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires. Madison, 1 Annals of Congress, 497. This rule of construction has been confirmed by this court in *Meriwether* v. *Garret*, 102 U. S. 472, 515, 26 L. ed. 197, 205; *Kilbourn* v. *Thompson*, 103 U. S. 168, 190, 26 L. ed. 377, 386; *Mug-*

ler v. *Kansas*, 123 U. S. 623, 662, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273."

We do not contend, of course, that the division of the powers of government are so absolute that inquiries that partake of the nature of judicial inquiries cannot be exercised by the administrative part of the government. Government could not well go on unless the executive branch had the power in the first instance to determine facts and apply law much in the same manner as courts determine facts and apply law especially as to matters falling within the governmental function and committed to the executive branch by the Constitution. And in a great number of cases this Court has held that powers of such a character could be conferred upon administrative officers, although, of course, there must be some method of judicial review provided.

But notice this: In every case of this character, the determination of facts and the application of law permitted to be exercised by administrative officers has been *incident to proceedings distinctly administrative in character*, such as the levy and collection of taxes, the exclusion of aliens and the like. And the judicial questions were in every case directly connected with the administrative duty. As will be seen hereafter, a judicial inquiry which is collateral to and not an essential part of the administrative duty, is not for the executive department of the government.

Very certainly this Court has never attempted a judicial repeal of Constitution, article 3, section 1, vesting the judicial power in the courts. The fact that the courts have

exclusive judicial power is just as strongly entrenched today as a sound political principle and a settled doctrine of constitutional law as it ever has been.

My liability as the transferee of your property, due to your failure to pay your taxes, has nothing whatever to do with taxation. The rights of the government under such circumstances are precisely the same as if you were a judgment debtor of the government on a promissory note, for a tort or what not. As Judge DAWSON said in the pioneer case of *Owensboro Ditcher & Grader Co. v. Lucas*, 18 Fed. (2d) 708, the government "occupies the same position as any other pursuing creditor, and its rights are worked out upon the same legal and equitable principles as obtain in cases of other general creditors, and not under the tax statute which determines the primary liability of the taxpayer."

Since no one up to this good hour has ever had the temerity to question the soundness of Judge DAWSON's conclusions and reasoning in the *Owensboro* case, and since even the Department recognized its validity by dismissing its appeal, and attempted to avoid the effect of the decision by procuring the enactment of the futile and abortive section 604 of the Revenue Act of 1928, we will quote at length from the opinion:

> "The legislative department has the undoubted right to levy a tax, and commit to a nonjudicial body the duty of assessment and collection, and if, at any stage of the procedure, the taxpayer is given the right to be heard by the authority charged with the assessment and collection thereof, he has not been denied due process of law. The plaintiff's liability, however, if

any, which the defendant, under section 280, is seeking to enforce, does not grow out of nor flow from any of the provisions of the Revenue Act of 1926, nor from any other statute of the United States. The Revenue Act of 1926 undertakes in no way to define the measure of the liability of the transferee of the property to a taxpayer, or to lay down any rule by which it may be determined. No revenue statute, so far as the court is advised, has ever undertaken so to do. So far as the court is advised, the liability of one who has had transferred to him the assets of a taxpayer before the government lien attached has always been worked out under general legal and equitable principles, or as the result of some local rule of property in the jurisdiction where the transferred property is located. The Revenue Act of 1926, insofar as measuring this liability is concerned, is no departure from what has been the general practice in the past. The Act of 1926 simply recognizes that in given cases this liability, under settled principles of law and equity, and sometimes under local rules of property, exists, and it undertakes to leave to the Commissioners to determine in each case if such liability does exist, and, if so, to fix the extent thereof and to enforce its collection.

"In considering this question it is well to remember that the taxes sought to be collected in this case are personal obligations of the taxpayer, directed against the taxpayer, and not against his property. Under section 115, title 26, U. S. C. (Revised Statutes, Sec. 3186; Comp. St., Sec. 4908), the government, as against the taxpayer, has no lien upon his property except from the time the assessment list is received by the collector in the office of the clerk of the District Court in the district within which the property subject to such lien is situated, and in the office of the proper clerk or recorder of deeds. Therefore, in those cases where

the government is seeking to recover taxes due by a taxpayer from a purchaser of his property, who became such before the attaching of the lien, it occupies the same position as any other pursuing creditor, and its rights are worked out upon the same legal and equitable principles as obtain in cases of other general creditors, and not under the tax statute which determines the primary liability of the taxpayer.

"Prior to the enactment of section 280 of the Revenue Act of 1926, these rights had always been determined by the judicial department, and not by the executive department. The extent and nature of the power attempted to be conferred upon the Commissioner by section 280 of the act in question, and the radical departure from the settled practice in such cases which would be brought about by the application of this section, perhaps can be best illustrated by enumerating some of the instances in which in the past it has been held that the transferee of the property of a debtor may be held liable for the debts of him from whom the property was received, and by an examination of the method by which this liability has always been determined and enforced.

"If A. transfers property to B., under a contract by which B. agrees to pay certain debts of A., the holders of these debts could bring an action at law against B. on his contract as one made for their benefit. Such legal liability, however, it has always been understood, could only be enforced in a suit in a court of competent jurisdiction, and in such suit B. could certainly plead any defense personal to himself, such as *non est factum*, offset, counterclaim, etc., and on these defenses, under the settled practice, he has always been entitled to a judicial hearing, with trial by jury, where the amount exceeded $20.

"If a corporation distributes its property to its stockholders, without paying its debts, in a suit in equity brought for that purpose, a stockholder could be made to answer for these debts to the extent of the value of the corporate assets received by him, and in such suit, before the stockholders' property could be subject to the payment of the corporate debts, he has always been entitled to his day in court, and a hearing upon such questions, as whether the judgment is void or voidable for want of jurisdiction or fraud, whether he is a stockholder and indebted, whether he received any of the assets of the corporation, the value thereof when received, and other defenses personal to himself. *Coe* v. *Armour Fert. Works,* 237 U. S. 413, 35 Sup. Ct. 625, 59 L. ed. 1027; *Great Western Telegraph Co.* v. *Purdy,* 116 U. S. 329, 16 S. Ct. 810, 40 L. ed. 986; *Bernheimer* v. *Converse,* 206 U. S. 516, 27 S. Ct. 755, 51 L. ed. 1163; *Converse* v. *Hamilton,* 224 U. S. 243, 32 S. Ct. 415, 56 L. ed. 749, Ann. Cas. 1913-D, 1292.

"Again, in case A. transfers his property to B. without consideration, B. could be held liable in a proper judicial proceeding for the debts of A. existing at the time of the transfer, to the extent of the property received by him, upon the theory of implied contract; but certainly B. has always been entitled to have judicially determined the validity of the debt, whether the transfer was without consideration, the value of the property transferred, and to interpose and have judicially determined other pertinent defenses.

"Liabilities such as those herein enumerated are the liabilities referred to in section 280, and heretofore have always been enforced by judicial proceedings. The matters involved are essentially judicial in character, and Congress is without power to withdraw them from judicial cognizance and confer them upon the executive department and the attempt in section 280 so to do

amounts not only to a denial of due process of law, but also is violative of section 1 of article 3 of the Constitution, which vests the judicial power of the United States in one Supreme Court and in such inferior courts as Congress may from time to time ordain and establish."

With all the emphasis that it is possible to give to words, we assert that if a proceeding to enforce the liability of a transferee to pay the debt of the transferor is not within the judicial power given exclusively to the courts, then there is no such power, and the courts, instead of being one of three independent departments of government, is an inferior department, wholly subordinated to the legislative and executive departments.

Very certainly neither this Court nor any other American court, is going to assent to the proposition that Constitution, article 3, section 1, is meaningless, and that the judiciary is utterly, wholly and hopelessly subordinate to the other two of the three supposedly separate and independent branches of the government. And if the Court is not willing to admit the utter subordination of the judiciary to the other departments, then there is no possible way to regard section 280 as anything less than an attempted invasion of the province of the judiciary. *Let us be emphatic in asserting that it is impossible to imagine proceedings any more distinctly judicial in character than proceedings to hold a transferee liable for the debts of the transferor.*

If so, what? We submit that not a single controversy will remain for the operation of judicial power, if this proceeding is not of that character.

For this proceeding is nothing more than a lawsuit, and has always been regarded as judicial in character. And if there are few cases to be cited, the answer is plain. *Never before has the Congress attempted to take from the courts the jurisdiction over a simple, plain, ordinary and always recognized lawsuit, and to give that jurisdiction to an administrative officer.*

But it may be said that the government is interested in a fiscal way and that that makes a difference. But the government has exactly the same fiscal interest when it takes property by eminent domain for public use, in the compensation to be paid, and yet it is definitely settled law that the determination of the amount of compensation is exclusively for the courts and cannot be conferred upon an executive officer.

United States v. *New River Collieries Co.*, 262 U. S. 341, 67 L. ed. 1014, involved a war-time statute under which the government took coal and attempted to fix the price, acting through the navy department. Denying its right to so fix the price, the Court said "the ascertainment of compensation is a judicial function and no power exists in any other department of the government to declare what the compensation shall be, or to prescribe any binding rule in that regard."

Monongahela Nav. Co. v. *United States*, 148 U. S. 312, 37 L. ed. 463, involved an eminent domain statute which provided "that in estimating the sum to be paid by the United States, the franchise of said corporation to collect tolls shall not be considered or estimated." This part of the

statute was held invalid on the ground that the amount of compensation to be paid upon an eminent domain taking presented a judicial question. The Court, after saying that "in any society the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government," continues as follows a little further on in the opinion:

> "By this legislation Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial, and not a legislative question. The public purposes—that is a question of a political and legislative character; but when taking has been ordered, then the question of compensation is judicial. It does not rest with the public taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry. In *Charles River Bridge Proprs.* v. *Warren Bridge Proprs.*, 36 U. S. 11 Pet. 420, 571 (9:773,833), Mr. Justice McLean in his opinion, referring to a provision for compensation found in the charter of the Warren Bridge, uses this language: 'They (the legislature) provide that the new company shall pay annually to the college in behalf of the old one a hundred pounds. By this provision it appears that the legislature has undertaken to do what a jury of the country only could constutionally do: assess the amount of compensation to which the complainants are entitled.' See, also, the following authorities: *Com.* v. *Pittsburgh & C. R. Co.*, 58 Pa. 26, 50; *Pennsylvania R. Co.* v. *Baltimore & O. R.*

Co., 60 Md. 263; *Isom* v. *Mississippi Cent. R. Co.*, 36 Miss. 300.

"In the last of these cases and on page 315, will be found these observations of the court: 'The right of the legislature of the state, by law, to apply the property of the citizen to public use, and then to constitute itself the judge in its own case to determine what is the "just compensation" it ought to pay therefor, or how much benefit it has conferred upon the citizen thus taking his property without his consent or to extinguish any part of such "compensation" by prospective conjectural advantage, or in any manner to interfere with the just powers and province of courts and juries in administering right and justice, cannot for a moment be admitted or tolerated under our constitution. If anything can be clear and undeniable upon principles of natural justice or constitutional law, it seems that this must be so'."

In determining whether a statute attempting to grant judicial power to an administrative officer is invalid as an invasion of the province of the judiciary, there is a fundamental difference between a grant of quasi judicial powers forming a part of proceedings distinctly and administrative in character and an attempted grant of strictly judicial powers.

This distinction, though not often distinctly drawn by the writers as fundamental, is clearly developed by this Court in cases to be considered, and is of the utmost importance. Where the power of determining the facts and applying the law is an integral part of the proceedings which are clearly administrative, then their exercise is not an invasion of the province of the judiciary. All that is required by

the Constitution in such case is the providing in some manner for a judicial review or supervision. And this judicial examination may be much more limited in character than the original hearing. Thus the determination by the administrative branch of the government may be made presumptively correct, or even conclusive, and the courts can go no further than to determine *(1)* if there was a denial of fair hearing, *(2)* if there was any evidence whatever to support the conclusion of fact, and, *(3)* to determine if there was the application of an erroneous rule of law. It is the application of this limited scope of review which lies at the bottom of the holdings that on appeals by a taxpayer the reviewing tribunal will only review questions of law and not pass on the sufficiency of the evidence.

—*Ox Fibre Brush Co.* v. *Blair,* 32 Fed. (2d) 42.

The law is entirely different when the matter involved is strictly judicial as in the instant case. The distinction is clearly developed in *NG Fung Ho* v. *White,* 259 U. S. 276, 66 L. ed. 938, the last of a series of decisions which we will now consider, *first,* in showing that administration proceedings, even with right of review, do not give the protection offered by judicial proceedings, and, *second,* that where the question is from its nature and character essentially judicial, the question is wholly for the courts from the first.

This Court has forcibly indicated its opinion that administrative proceedings do not furnish the protection to individual rights that is given by judicial proceedings.

In *United States* v. *Woo Jan,* 245 U. S. 552, 62 L. ed. 466, a Chinese exclusion case, involving an administrative

right given by statute to deport Chinese aliens, the Court calls attention to the difference between administrative and judicial action, and says:

> "The government recognized that the difference—we might say contrast—is the step on which it 'must fall down, or else o'erleap.' And necessarily so. Manifestly the remedy of section 21 has not the safeguards of impartiality and providence that the remedy of the Exclusion Laws has. Mere discretion prompts the first and last act of the former; the latter has the security of procedure and ultimate judgment of a judicial tribunal, where all action which precedes judgment is upon oath and has its assurance and sanctions."

In *White* v. *Chin Fong*, 253 U. S. 90, 64 L. ed. 797, a similar case, the Court speaks of a judicial investigation "with its assurances and sanctions as contrasted with the discretion which may prompt or the latitude of judgment which may be exercised in the executive action."

And in *NG Fung Ho* v. *White*, 259 U. S. 276, 66 L. ed. 938, the Court speaks against the danger of deportation "without the sanction afforded by judicial proceedings," and speaks of the "difference in security of judicial over administrative action."

These deportation cases are conclusive upon the proposition *that where the controversy is at its inception a judicial one, then due process of law is not satisfied by reason of the existence of some method of judicial review, but the administrative officers are wholly without jurisdiction in the premises.* These cases are very sharply in point and present a situation much more extreme than the instant case, since

there is not the least doubt of the right of Congress to make any provisions it sees fit for the exclusion of aliens and for the deportation through executive action of aliens wrongfully entering the country. This is the general rule, but the situation may be such as to involve a judicial question, and in this case the Department is without any jurisdiction to act in the first instance.

In *United States* v. *Woo Jan*, 245 U. S. 552, 62 L. ed. 466, the Secretary of Labor attempted to exercise the power supposed to be conferred upon him by causing the arrest of Woo Jan as a Chinese alien, with the view and purpose of deporting him. Woo Jan was arrested and petitioned the District Court in *habeas corpus* to be discharged from arrest, asserting his right to be and remain in the United States and setting up as grounds for it that he was a merchant and that his status as a resident has been investigated by the authorities of the United States and established and that there was no authority of law for the issuance of the warrant.

The question of the right of the Secretary of Labor to proceed administratively was presented to this Court by certified questions, and it was held that the question presented was a judicial one, that there was no jurisdiction to deport through administrative action, and that Woo Jan was entitled to discharge by *habeas corpus*.

While it may be claimed that the above case turned on the question of the statute involved, rather than the limitations upon the executive power, the same contention can hardly be made as to the decision in *White* v. *Chin Fong*,

253 U. S. 90, 64 L. ed. 797. There the Department attempted to deport a Chinaman claiming the right to re-enter the United States as a returning merchant, on the ground that his original entry was fraudulent. This seemed to bring the case within the Deportation Act (Act Feb. 20, 1907), providing that in case the Secretary of Commerce and Labor should be satisfied that an alien has been found in the United States in violation of this act or that an alien is subject to deportation under the provisions of this act or any law of the United States, he shall cause such alien within a period of three years after landing of entry, to be taken into custody and returned to the country from where he came. But this Court denied the contention of the Department holding that if the Chinaman denied the claim of fraud and asserted that he was rightfully entitled to remain in the United States that the question was a judicial one and the Department without jurisdiction to act administratively. It was held he was entitled to his discharge on *habeas corpus*.

In the case of *NG Fung Ho* v. *White*, 259 U. S. 276, 66 L. ed. 938, the Department arrested and attempted to deport by administrative proceedings a Chinaman who claimed that he was rightfully entitled to remain in the United States. The Chinaman sued out a writ of *habeas corpus*, which writ was quashed and the action of the District Court in quashing the writ affirmed by the Circuit Court of Appeals. The case was taken to this Court. Calling attention to the fact that the petitioners did not merely assert a claim of citizenship, but supported the claim by evidence sufficient, if believed, to entitle them to a find-

ing of citizenship, this Court held that the case presented a judicial question in which the petitioners were entitled to a *de novo* trial in the courts, and that due process of law was not satisfied by a review of the Department's action in the usual manner when the Department acts within its jurisdiction. The Court speaks as follows:

> "Jurisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact. The situation bears some resemblance to that which arises where one against whom proceedings are being taken under a military service. It is well settled that in such a case a writ of *habeas corpus* will issue to determine the statute. *Ex parte Reed,* 100 U. S. 13, 25 L. ed. 538; *Re Grimley,* 137 U. S. 147, 34 L. ed. 636, 11 Sup. Ct. Rep. 54; *Re Morrissey,* 137 U. S. 157, 34 L. ed. 644, 11 Sup. Ct. Rep. 57; *Johnson* v. *Sayre,* 158 U. S. 109, 39 L. ed. 914, 15 Sup. Ct. Rep. 773. Compare *Ex parte Crow Dog (Ex parte Kang Gi Shun-Ca),* 109 U. S. 556, 27 L. ed. 1030, 3 Sup. Ct. Rep. 396. If the jurisdiction of the Department of Labor may not be tested in the courts by means of the writ of *habeas corpus* when the prisoner claims citizenship and makes a showing that his claim is not frivolous, then, obviously, deportation of a resident may follow upon a purely executive order, whatever his race or place of birth. For where there is jurisdiction, a finding of fact by the executive department is conclusive *(United States* v. *Ju Toy,* 198 U. S. 253, 49 L. ed. 1040, 25 Sup. Ct. Rep. 644); and courts have no power to interfere unless there was either denial of a fair hearing *(Chin Yow* v. *United States,* 208 U. S. 8, 52 L. ed. 369, 28 Sup. Ct. Rep. 201), or the finding was not supported by evidence *(American School* v. *McAnnulty,* 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33), or there was an applica-

tion of an erroneous rule of law *(Gegiow* v. *Uhl,* 239 U. S. 3, 60 L. ed. 114, 36 Sup. Ct. Rep. 2). To deport one who so claims to be citizen obviously deprives him of liberty, as was pointed out in *Chin Yow* v. *U. S.,* 208 U. S. 8, 13, 52 L.ed. 369, 370, 28 Sup.Ct.Rep. 201. It may result also in loss of both property and life; or of all that makes life worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings, the 5th Amendment affords protection in its guaranty of due process of law. The difference in security of judicial over administrative action has been adverted to by this court."

The foregoing exclusion cases are conclusive upon the proposition *that where the matter is judicial at its inception, then due process of law is not accorded by an administrative hearing from which an appeal is permitted, since the scope of the appeal is not as broad as the scope of the original hearing.* Thus, if the controversy is original in its inception it is judicial from the very first and it cannot be conferred upon an administrative tribunal, regardless of the fact that provision is made for an appeal.

In *Lew Shee* v. *Nagle;* 7 Fed. (2d) 367 (9 C. C. A.), the syllabus reads as follows:

"Claims of citizenship, supported by competent evidence, by one sought to be deported as an alien, entitles her to a judicial trial, and renders void the department's order of deportation as in excess of its jurisdiction, as it cannot invade the province of the court by declaring the claim frivolous and the testimony in its support unworthy of belief.

"We think the same rule is applicable here. If an order of deportation is supported by competent evi-

dence where the rights of an alien are involved, the court cannot invade the province of the executive department. If, on the other hand, there is a claim of citizenship supported by competent evidence, the executive department cannot i n v a d e the province of the courts. It cannot do so directly, nor can it accomplish the same result indirectly by simply declaring that the claim of citizenship is frivolous and the testimony offered in its support unworthy of belief. In the light of what has been said, without any attempt to review the testimony, it is manifest from a mere inspection of the record before us that there was such a supported claim of citizenship here as to oust the executive department of jurisdiction."

The distinction between judicial matters which cannot be submitted to administrative tribunals and officers, and matters which may be so submitted is developed in the recent case of *Ex parte Bakelite Corp.*, 279 U. S. 438, 73 L. ed. 789, relating to the Court of Customs Appeals. The principle is developed that judicial functions cannot be given administrative tribunals or officers, even though "from their nature susceptible of determination by the courts," unless they "admit of legislative or executive determination." In sustaining the Court of Customs Appeals, the Court uses the following suggestive language as to the subjects entrusted to the jurisdiction conferred on certain similar courts: "They all admit of legislative or executive determination, and yet from their nature are susceptible by determination by the courts." "The matters made cognizable therein include nothing which inherently or necessarily require judicial determination." "But its functions, although

mostly *quasi* judicial, were all susceptible of performance by executive officers and had been performed by such officers in earlier times." "The appeals include nothing which inherently or necessarily require judicial determination, but only matters the determination of which may be, and at times have been, committed exclusively to executive officers."

We submit that the determination of a transferee's liability "inherently" and "necessarily" requires judicial determination. Creditors' suits always have been regarded as strictly judicial, have never been "committed to executive officers," and that, therefore, section 280 violates Constitution, article 3, sections 1 and 2.

Revenue Act 1926, section 280, is in violation of Const., Amend. 5, requiring due process of law.

In *Owensboro Ditcher & Grader Co.* v. *Lucas*, 18 Fed. (2d) 798, the court says on this phase of the case:

> "That section 280 of the Revenue Act of 1926, if enforced as the bill alleges is threatened to be done in this case, will result in denying to the plaintiff due process of law within the meaning of the 5th Amendment to the Constitution of the United States, seems too obvious for extended discussion, and in reaching this conclusion I am not unmindful of the rule that taxes, as such, may be assessed against and collected from the taxpayer by an administrative body, without giving the taxpayer any right to resort to the courts prior to the payment of the tax."

No court, excepting the Second Circuit Court of Appeals in the case at bar and the Circuit Court of Appeals

of the Sixth Circuit in *Routzahn* v. *Tyroler, supra,* has seen fit to deny this, as will be seen from the cases heretofore cited, in which the statute came up for consideration. Moreover, in respect of the *Routzahn* case, *supra,* it is noteworthy that section 280 was not held unconstitutional specifically, "as against contention that an opportunity to be heard ended with Board of Tax Appeals since transferee has right to have whole matter heard by Circuit Court of Appeals under the Revenue Act of 1926, section 1001." And the Second Circuit Court of Appeals in the case at bar simply followed the *Routzahn* case. But the reasoning of the Court in the *Routzahn* case is plainly fallacious, because a transferee does not have the right to have the whole matter heard by the Circuit Court of Appeals as has been decided by the Third, Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Circuit Courts of Appeals, respectively, in the following cases:

Bishoff v. *Commissioners of Internal Revenue,* 27 Fed. (2d) 91;

Avery v. *Commissioners of Internal Revenue,* 22 Fed. (2d) 6;

Collin v. *Commissioners of Internal Revenue,* 32 Fed. (2d) 753;

Am-Plus Storage Battery Co. v. *Commissioner of Internal Revenue,* 35 Fed. (2d) 167;

Blair, Commissioner of Internal Revenue, v. *Byers,* 35 Fed. (2d) 326;

Royal Packing Co. v. *Commissioner of Internal Revenue,* 22 Fed. (2d) 536;

Prey Bros. Live Stock Commission Company v. *Internal Revenue Commission,* 36 Fed. (2d) 323.

The fact that the government's claim originated in a tax imposed by a Revenue Act of Congress, and that the tax is collectable from the taxpayer by the executive or administrative branch of the government does not in any way tend to show that proceedings of the government against a transferee of the taxpayer are "tax" proceedings under the Constitution or that such proceedings against a transferee are administrative in character. In principle, this Court has settled this in the eminent domain cases. No one will deny that eminent domain is entirely administrative or may be made so by Congress up to the point of determining the amount of compensation to be paid, and the determination of such compensation is more closely related to the proceedings to condemn than is the liability at law or in equity of a transferee for the taxes of a transferor taxpayer. Yet this Court emphatically denies the right to have compensation in such cases fixed as an administrative matter.

—*United States* v. *New River Collieries Co.*, 262 U. S. 341, 67 L. ed. 1014;

Monongahela Nav. Co. v. *United States*, 148 U. S. 312, 37 L. ed. 463;

Charles River Bridge v. *Warren Bridge*, 36 U. S. 420, 571, 9 L. ed. 773.

The government will doubtless attempt to sustain section 280 on the theory that the proceedings attempted to be authorized "are proceedings for the collection of a tax." This is incorrect. While the debt owing the government may have originated as a "tax," it is very clear that the government's claim as against the transferee is not a "tax"

claim or case in any true sense of the term. Because neither the Revenue Acts nor section 280 fixes or creates any liability against the transferee as such in respect of the government's claim, whereas, in every "tax" claim, the liability of the taxpayer or party sought to be held liable is fixed and created by Congress under the Revenue Acts, and the Commissioner of Internal Revenue acts merely as an administrative officer in collecting the government's claim as created by Congress. Again in "tax" cases or claims, strictly speaking, the debtor or taxpayer is personally liable to the government for the whole claim; whereas, under claims against transferees, the transferee is not personally liable, unless by virtue of an express or implied contract, which involves a question for judicial determination; and without which a transferee can be held liable if at all only on general, legal or equitable principles enforced by the courts; and then not for the full amount of the government's claim but only for the value of the property of the taxpayer which the transferee has received.

—*United States* v. *McHatton*, 226 Fed. 602;
Updike v. *United States*, 8 Fed. (2d) 913.

Again, it is a rule often recognized by the Department itself that there is no liability of any kind against a *bona fide* transferee.

—O. D. 597, C. B. 3,300;
O. D. 769, C. B. 4,324;
Fostoria Milling & Grain Co., 11 B. T. A. 1401.

The government will probably contend that proceedings under section 280 are "a substitute for bills in equity in

creditors' suits." This is justified by the cases which regarded suits by the government against transferees as being in the nature of creditors' suits and treat "taxes" for the purpose of such suits as debts.

—*United States* v. *McHatton*, 266 Fed. 602;

Owensboro Ditcher & Grader Co. v. *Lucas*, 18 Fed. (2d) 798.

See, also, in reference to trust fund doctrine:

Updike v. *United States*, 8 Fed. (2d) 913.

Suit by the government against the transferee has always been regarded as a creditor's bill, and the law is very well settled that in a creditor's suit the measure of recovery is not the debt due plaintiff from the transferor, *but the value of the property transferred.* It is so held by this Court in *Dunphy* v. *Kleinschmidt*, 11 Wall. 610, 20 L. ed. 223, where, in speaking of the transferee, it says: "He must be called to account for just what property has come into his hands and no more; and he will be entitled under ordinary circumstances to a rebate for the amount that was justly and honestly his due."

And it is to be remembered that while a fraudulent transferee is liable only for the value which he received without paying consideration therefor, as held in the above case, it is not always true, depending upon the facts, that any one creditor of the transferor will receive all the transferee surrenders. All the creditors come in, questions of priority come up, and the liability of the transferee is divided between the creditors of the same class, after deducting pre-

ferred claim. And the fact that the debt of the government had its inception as a debt for taxes does not always make it a preferred claim. For instance it is indicated by the following cases that a debt for taxes is junior to lien claims:

Sherwood v. *United States*, 5 Fed. (2d) 991;
Ormsbee v. *United States*, 23 Fed. (2d) 926.

The situation very clearly indicates that the attempt to confer the function of determining a transferee's liability upon an administrative officer is a denial of due process. The situation is infinitely more complicated and reveals the necessity of the protection to be had only in judicial proceedings much more strongly than the comparatively simple question of compensation in eminent domain proceedings, and yet, as we have seen, this Court holds the latter question to be one exclusively for the judiciary. Moreover, creditors' suits have always been regarded as judicial. No one has ever imagined the contrary. And in all the tax cases we have examined not one shows an attempt to assert a transferee's liability by administrative proceedings.

No doubt a strenuous attempt will be made to fix the action of the Commissioner in his attempt to fix a transferee's liability as the assessment of a tax. But we are unable to see any advantage in artificialties, when the situation is entirely clear. Certainly the asserted debt of the government is for taxes, but it is just as clear that it is not the transferee's taxes. The statute itself does not purport to deal with a taxpayer's liability. In terms the liability is specified as a transferee's liability. And to say that such liability is a tax liability recalls the language of Mr. Justice

HOLMES in *Guy* v. *Donald*, 203 U. S. 399, 51 L. ed. 245: "As long as the matter to be considered is debated in artificial terms there is danger of being led by a technical definition to apply a certain name, and then to deduce consequences which have no relation to the ground on which the name was applied."

In *Coffin Bros. & Co.* v. *Bennett*, 277 U. S. 29, 72 L. ed. 768, it was held that a state statute authorizing the State Superintendent of Banks to issue executions against the stockholders of an insolvent bank for the amount of the assessment necessary to meet the claim of creditors, was constitutional and not a denial of due process, but this holding was predicated upon the fact that the statute provided that a stockholder should have the right, by filing an affidavit of illegality, to contest his liability for such assessment and the amount and necessity thereof. Upon the filing of such an affidavit the execution was to be returned to court for trial. The Court sustained the statute because it is said that "the stockholders are allowed to raise and try every possible defense by an affidavit of illegality, which, as said by the Supreme Court of Georgia, makes the so-called execution 'a mode only of commencing against them suits to enforce their statutory liability to depositors'." Inferentially the case seems to be authority for the proposition that a statute of this kind would be a denial of due process unless it gave a right to a judicial hearing *de novo*.

In *Grand Trunk R. Co.* v. *Ives*, 144 U. S. 408, 36 L. ed. 485, a personal injury case, the railroad made the contention that the fact that the whole subject of signals, flagman,

gates, etc., at crossings was regulated by statutes, would relieve it from adopting such other measures as common prudence dictated. The Court denied the contention, saying that "neither the legislature nor railroad commissioner shall arbitrarily determine in advance what shall constitute ordinary care or reasonable prudence in a railroad company at a crossing in every particular case which may afterward arise."

Coe v. *Armour Fertilizer Co.*, 237 U. S. 413, 59 L. ed. 1027, involved the validity of a state statute which provided that upon the return of an execution against a corporation *nulla bona*, an execution may issue against a stockholder for unpaid subscriptions. It was held that the statute was a denial of due process, the Court saying that "before a third party's property may be taken to pay that indebtedness upon the ground that he is a stockholder and indebted to the corporation for an unpaid subscription, he is entitled upon the most fundamental principles to a day in court and a hearing upon the questions as to whether the judgment is void or voidable for want of jurisdiction or fraud, whether he is a stockholder and indebted, and other defenses personal to himself." The Court further says that "the suggestion that because, under sections 1624 and 1625, a hearing upon pertinent questions of fact may be had at the instance of the alleged stockholder after the execution issues, and before interference with his possession or his property right, therefore plaintiff in error, having been at liberty in this proceeding to raise meritorious questions, is not 'within the class who may justly complain' will not withstand critical analysis."

This Court has many times undertaken in this language or that to define due process. It has succeeded rather admirably in doing so. In *Pennoyer* v. *Neff*, 95 U. S. 714, s. c. 24 L. ed. 565, and in *Endicott-Johnson Corporation* v. *Encyclopedia Press*, 266 U. S. 285, s. c. 69 L. ed. 288, the Court thus defined it:

> "A course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights."

In *Turner* v. *Wade*, 254 U. S. 64, s. c. 65 L. ed. 134, a county board of supervisors in the State of Georgia, under duly conferred statutory authority, raised the assessment of a taxpayer's property without prior notice to him. The Court held that the fact that notice might thereafter have been given to him as under the statute, with a consequent right in him to demand an arbitration, did not afford him "the opportunity to be heard, whether personally, by publication, or by statute fixing the time or place of the hearing," and that the proceeding was, therefore, an unconstitutional deprivation of his property.

But if there be an appeal to the Circuit Courts of Appeal, there is no appeal anywhere provided upon the facts which may underlie the transferee's obligation at law or in equity. The appeals which the framers of the act wrote into it, are appeals solely upon the law of the case. At least it has so been written by the Circuit Court of Appeals of seven circuits. The case of *Avery* v. *Commissioner*, 22 Fed. (2d) 6, by the Circuit Court of Appeals of the First Circuit, is illustrative. In that case the court said:

"It is clear from the wording of the statute that the jurisdiction given to this court is to review only errors of law in a decision of the board."

Where, then, is there in the act judicial process for the transferee as to the facts which may, or may not, impose liability upon him?

But there is another barrier against such an appeal, in that sections 1001 of the 1926 Act and 603 of the 1928 Act forbid even a taxpayer to appeal until he has given bond in double the amount of the liability asserted against him. And if perchance the transferee's worldly circumstances make it impossible for him to give such a bond, he must submit to the Commissioner's will. And there is not much of due process of law about that. This Court has written that there is not. In *Chicago & Northwestern R. Co.* v. *Nye Schneider Fowler Co.*, 260 U. S. 35, s. c. 67 L. ed. 115, Chief Justice TAFT said:

"This we do not think is fair play. Penalties imposed on one party for the privilege of appeal to the courts, deterring him from the vindication of his rights, have been held invalid under the 14th Amendment."

In *Missouri Pacific R. Co.* v. *Tucker*, 230 U. S. 340, s. c. 57 L. od. 1507, it is written:

"If the law be such as to make the decision of the legislature or of a commission conclusive as to the sufficiency of the rates, this court has held such a law to be unconstitutional. * * * A law which indirectly accomplishes a like result by imposing such conditions upon the right to appeal for judicial relief as works an abandonment of the right rather than face the condition

upon which it is offered or may be obtained is also unconstitutional."

Not only is a bond required, but on the appeal all the presumptions are in favor of the action of the Commissioner. And the courts hold that there can be no review of the evidence. Thus, we have a proceeding which has always been regarded as a suit for a court, transferred to an administrative officer, with no provision by which the controversy can be determined *de novo* by the court. This is not due process as described in *Twining* v. *New Jersey*, 211 U. S. 78, 53 L. ed. 97, wherein it is said that: "Consistently with the requirements of due process, no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law, and guard him against the arbitrary action of government."

Section 280 of the Revenue Act of 1926 is in violation of the Const., Amend. 7, guaranteeing the right of trial by jury in suits at common law.

Amendment 7 to the Constitution provides as follows:

"In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by jury shall be otherwise re-examined by any court of the United States than according to the rules of common law."

The language of section 280 of the Revenue Act of 1926, itself indicates that the liability of a transferee of property of a taxpayer in respect of the tax imposed upon

the taxpayer by the Revenue Acts of Congress, may be one either at law or in equity. As pointed out in the *Owensboro* case, *supra*, the liability of a transferee of a taxpayer is different from the primary liability of the taxpayer, which latter liability is imposed by Congress upon the citizen, subject to the tax; but when the government undertakes to collect this liability against a third party such and as the transferee against whom the tax was not originally assessed, the liability rests upon different considerations or rather upon general, legal and equitable principles. And the liability of a transferee from its very nature and character, is a contractual one, either express or implied; and if the transferee has contracted with the taxpayer to pay his tax, the government's right to proceed against him is at law upon an express or implied contract. In the latter case the 7th Amendment to the Constitution applies with full force and effect, entitles the transferee to a jury trial in the determination of the fact of liability as well as of the amount of the liability.

Without further argument we submit that from the very nature of the liability and from the very language of section 280 itself, the transferee's liability may be one at law, as distinguished from a liability in equity, and that therefore section 280 which attempts to confer jurisdiction on the executive branch of the government to determine this liability without a jury trial, is unconstitutional when measured by the 7th Amendment to the Constitution.

Revenue Act of 1926, section 280, is bad for uncertainty.

We think the decisions involving the Lever Act settle this question. It will be noticed that section 280 is an attempt to confer jurisdiction on the Commissioner, over one of the most complicated of judicial proceedings, without in any manner indicating the procedure to be followed. How such a statute can be regarded as having the requisite certainty is entirely beyond us.

In *United States* v. *Cohen Gro. Co.*, 255 U. S. 81, 65 L. ed. 516, a section of the Lever Act, providing "that it is hereby made unlawful for any person wilfully to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessities, was held in violation of the 5th and 6th Amendments of the United States Constitution for its indefiniteness and uncertainty. In the opinion the Court speaks as follows:

> "Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee, and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below in its opinion to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury. And that this is not a mere abstraction finds

abundant demonstration in the cases now before us; since in the briefs in these cases the conflicting results which have arisen from the painstaking attempts of enlightened judges in seeking to carry out the statute in cases brought before them are vividly portrayed. As illustrative of this situation we append in the margin a statement from one of the briefs on the subject. And again, this condition would be additionally obvious if we stopped to recur to the persistent efforts which, the records disclose, were made by administrative officers, doubtless inspired by a zealous effort to discharge their duty, to establish a standard of their own to be used as a basis to render the section possible of execution."

The same conclusion was reached in *Weed & Co.* v. *Lockwood*, 255 U. S. 104, 65 L. ed. 532.

The above cases were criminal and there is language in the opinions holding the statute bad for indefiniteness on the ground of not establishing a criminal standard with sufficient certainty. But it is submitted that the principle holds good in civil cases and in reference to civil statutes.

The validity of the Lever Act again came before this Court in *Small Co.* v. *American Sugar Refining Co.*, 267 U. S. 233, 69 L. ed. 589, which was a civil case involving the Lever Act, and where the Court adhered to its former holdings. The Court speaks as follows:

"It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all. Any other means of exaction, such as declaring the transaction unlawful or stripping a participant of his rights under it, was equally within the principle of those cases. They have been

so construed and applied by other courts in civil proceedings. *Standard Chemicals & Metals Corp.* v. *Waugh Chemical Corp.*, 231 N.Y. 51, 54, 14 A.L.R. 1054, 131 N. E. 566; *Dunman* v. *South Texas Lumber Co.*, ... Tex. Civ. App. ..., 252 S. W. 274, 275. In the first of these citations, the Court of Appeals of New York, referring to this court's ruling in the *L. Cohen Grocery Co.* case, well said: 'The ground on which it placed its judgment applies, and with like consequences, to civil suits as well. The prohibition was declared a nullity because too vague to be intelligible. No standard of duty had been established. * * * The variant views of judges of the District Courts were quoted as evidence of the absence of a standard. If this is the rationals of the decision, its consequences are not limited to criminal prosecutions. A prohibition so indefinite as to be unintelligible is not a prohibition by which conduct can be governed. It is not a rule at all; it is merely exhortation and entreaty'."

Yu Cong Eng. v. *Trinidad*, 271 U. S. 500, 70 L. ed. 1059, involved a Philippine statute, which provided that "it shall be unlawful for any person, company or partnership or corporation engaged in commence, industry or any other activity for the purpose of profit in the Philippine Islands in accordance with existing law to keep its account books in any language other than English, Spanish or any local dialect." The statute was to prevent fraud against taxation and was regarded as primarily directed against Chinese merchants. Calling attention to the fact that the language admitted of several different constructions, pointed out in the opinion, the Court held that the statute was in violation of the Constitution and violated the due process clause by

reason of its uncertainty. It is held, as stated, in the Law Edition syllabus, that a statute which requires the doing of an act so indefinitely described that men must guess at its meaning, violates due process of law.

If Revenue Act 1926, section 280, be regarded as authorizing a tax, then it is in violation of Const., Art. 1, Sec. 2, clause 3, requiring direct taxes to be apportioned, and not within Amend. 16, authorizing income taxes without apportionment.

The government's insistence that section 280 is to be regarded as authorizing the assessment of a tax, raises the question of what kind of a tax the government thinks is to be assessed. Very certainly it is not a tax on the income of the party to be assessed. It is equally certain that it is not a tax measured by the income of the original taxpayer, since, as we have seen, a transferee's liability is not measured by the amount of the asserted claim. Maybe it is an excise tax on the privilege of purchasing property from persons who may be indebted to the government for taxes!

It appears to us that the government is face to face with a dilemma. If the statute authorizes the Commissioner to levy a tax, the statute is clearly in violation of Const., Art. 1, Sec. 2, clause 3, requiring direct taxes to be apportioned among the states. If an assessment of a transferee's liability must be regarded as the assessment of a tax, in order to save its constitutionality, as the government seems to think, then very certainly the statute comes in head on collision with the above constitutional provision since it would clearly be a direct tax, but not an income tax, and

Amendment 16 only relates to income taxes. If the government is right in its contention, it establishes the invalidity of the statute under the doctrine of *Pollock* v. *Farmers Loan & Trust Co.*, 158 U. S. 601, 39 L. ed. 1108.

Point D.

The Government's Cases Distinguished.

In the case in the Tenth Circuit Court of Appeals in which the writers of this brief are attorneys, the government, in support of its contention that the above referred to section 280 is constitutional, cited a number of cases, and we would like to briefly consider said cases. In said case the government first cited the cases of *United States* v. *Lazenby*, 5 Fed. (2d) 827; *United States* v. *Russell, et al.*, 22 Fed. (2d) 249; same case, 278 U. S. 181; *United States* v. *Updike, et al.*, 25 Fed. (2d) 746; and the same case, 32 Fed. (2d) 1, evidently with the idea that the same sustain the notion that the transferee's liability is a tax liability. These cases, however, merely hold that the statutory limitations of suits to collect taxes apply to suits against a transferee, and it would be a strange thing to think that Congress intended to impose a limitation on suits against a taxpayer without intending a like limitation against the transferee, and the cited cases go no further. They indicate that a suit by the government against the transferee is a suit for taxes, meaning, of course, simply that the end sought is merely the satisfaction of the claim, which had its inception in taxes against the transferor. Thus, *Felland* v. *Wilkinson*, 33 Fed. (2d) 961, also relied upon by the government in said case to sustain the foregoing contention,

merely holds that the claim continues as a claim for taxes, though the court in that case admits the liability of a transferee is not "a tax liability in the ordinary sense." It is going a long way to cite this case as tending to sustain the constitutionality of section 280, in view of the court's conclusion that *Owensboro Ditcher & Grader Co.* v. *Lucas*, 18 Fed. (2d) 798, is unanswerable.

It is interesting in relation to the notation that a transferee's liability is a tax liability to note the language of Hon. Wm. R. Green, Chairman of Ways and Means, in the conference report set out in the appendix hereto. It is there said that the purpose was to apply the same procedure against the transferee "as though he were the taxpayer." It may be suggested also that this report indicates that the statute is not intended to apply to "a *bona fide* sale." (See report in appendix hereto.) It is also interesting to note that Mr. Green, when he became a member of the Board of Tax Appeals, was forced to conclude, as is evidenced in his opinion in the *Cappellini* case, 14 B. T. A. 1269, that section 280 was invalid.

In the foregoing case the government also cited and relied upon *Hersee* v. *Porter*, 100 N. Y. 403, 3 N. E. 338; *United States* v. *Baltimore & Ohio R. R.*, 17 Wall. 322; *Dike* v. *Carleton*, 61 N. H. 574; *Fowble* v. *Kemp*, 92 Md. 630, 48 Atl. 379; *Vermont and C. R. Company* v. *Vermont Cent. R. Co.*, 63 Vt. 1, 21 Atl. 262; *Gray* v. *Finn*, 96 Mich. 62, 55 N. W. 615; *Michigan Lake Superior Power Company* v. *Atwood*, 126 Mich. 651, 86 N. W. 139; *Bloxham* v. *Fla. Central R. R. Co.*, 35 Fla. 625, 17 So. 901; *Sears* v. *Cottrell*, 5 Mich.

251; *Morrow* v. *Dows*, 28 N. J. Eq. 459; *McGregon* v. *Montgomery*, 4 Pa. State 237; *Dawson* v. *Dawson*, 106 Ga. 45, 32 S. E. 29; *Blacklock* v. *United States*, 208 U. S. 75; *United States* v. *Snyder*, 149 U. S. 210; *United States* v. *Curry, et al.*, 201 Fed. 371, and *United States* v. *Dillin*, 168 Fed. 813. But we are unable to see wherein said cases, or any of them, have the least tendency to sustain the constitutionality of section 280. If these cases touch the instant case in any way, it is in showing that the issue raised by one who claims that his property is not subject to certain taxes on the theory that the tax was against another, is always one disposed of as a judicial matter. A number of these cases relate merely to the validity of statutes imposing a duty on agents and the like to pay taxes, which, of course, only goes to the mode of collection.

However, these cases do sustain the proposition that when a tax warrant is issued against A., it may be levied against property in possession of B., if the officer thinks the property belongs to A. But the cases show that if B. claims the property the issue is for the courts. Not one of these cases has anything to do with creditors' suits based on taxes, or the right to assess transferees. Suffice it to say that an examination of these several cases will disclose that they are clearly not in point with the case at bar.

In the foregoing case the government also cited and relied upon several cases to show that power to pass on facts and apply law may even be conferred on administrative officers. We have no quarrel with any such cases. The real question is where the line is to be drawn, since the courts

have never surrendered their exclusive constitutional jurisdiction over judicial matters, and the line has been drawn by this Court in *Ex parte Bakelite Corp.*, 279 U. S. 438, 73 L. ed. 789. If the matter is one of the kind that may be given to administrative officers without judicial hearing, then hearing may be provided for, but before administrative tribunals or officers, not otherwise.

In the foregoing case the government seemed to rely principally upon the case of *Murray's Lessees, et al.*, v. *Hoboken Land and Improvement Company*, 18 How. 272, which is against it. The case was ejectment by plaintiff, who had purchased the land in question at an execution sale, against defendant, who had purchased it at a sale under an administrative distraint sale against a defaulting officer. The lien under the distraint was prior if the distraint warrant was valid. The Court held it was. *But notice this, for it is the gist of the decision:* the Court reached its conclusion upon the historical ground *that such proceedings against officers had always been administrative.* So the case harmonizes exactly with the *Bakelite* case. And in the opinion the Court said:

> *"To avoid misconstructions upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty;* nor on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination."

There is no similar historical background for section 280—just the reverse. Again turning to the Green report (see appendix) we read thus: "Prior to the 1926 Act, collection procedure against the transferee (except where a lien had attached before the transfer) was by suit at law or in equity in the federal District Court." Of course, we all know that creditors' suits have always been regarded as involving issues wholly judicial. Section 280 has no supporting history behind it.

Point E.

Criticism of the Case of *Routzahn v. Tyroler.*

The above case and the case at bar are the only cases that we know of which hold that the above referred to section 280 is constitutional, but having read and reread the *Routzahn* case, we confidently believe that the Court will not obtain much satisfaction therefrom. And it is noteworthy that on the same day the Sixth Circuit Court of Appeals handed down its opinion in the *Routzahn* case it handed down an opinion in the case of *Nauts* v. *Clymer*, 36 Fed. (2d) 207, in which it said:

> "We assume, without deciding, that section 280 of the Act of February 26, 1926 (chapter 27, 44 Stat. 9), is valid," etc.

We have heretofore commented upon the *Routzahn* case, but before concluding this brief we desire to advance a few additional thoughts in connection therewith.

We think the most that can be said of the *Routzahn* case is that the decision therein must be limited to the hold-

ing that the following contention of the appellee in that case, to-wit, that section 280 was violative of Amendment 5 to the Constitution for the reason and upon the ground "that an opportunity to be heard ended with Board of Tax Appeals," was untenable, and that such limited holding was predicated upon the erroneous holding of the court that a "transferee has right to have whole matter heard by Circuit Court of Appeals under Revenue Act 1926, section 1001." And that such holding was erroneous, we have heretofore cited cases from seven Circuit Courts of Appeals to the effect that a transferee does not have "right to have the whole matter heard by Circuit Court of Appeals," but that the conclusion of the Board of Tax Appeals upon the facts is conclusive and that the Circuit Court of Appeals is limited to reviewing questions of law.

While in the *Routzahn* case the Court states that for the purpose of its decision it assumes that a transferee's liability "is not one inherently incidental to the taxing power, but is a judicial question beyond the power of Congress to transfer to the administrative category," it is obvious that the court then proceeds to reach its conclusions and decide the case upon the contrary and erroneous assumption that the matter of determining a transferee's liability is an administrative matter. And we have heretofore shown that in no view of the matter can the question as to the liability of a transferee be held to be an administrative matter, but is inherently and essentially a judicial matter, and that consequently it is beyond the power of Congress to transfer the same to "the administrative category."

The vice of the *Routzahn* decision is twofold: *(1)* In erroneously holding that a transferee "has the right to have the whole matter heard by Circuit Court of Appeals in the exercise of its power to review;" and *(2)* in erroneously holding that the determination of the liability of a transferee is an administrative and not a judicial matter.

Of course, if the matter of determining the liability at law or in equity of a transferee is an administrative and not a judicial matter, Congress might confer upon the Commissioner of Internal Revenue the right to make such determination, regardless of any provision for appeal to the Board of Tax Appeals and then to the Circuit Court of Appeals. But, on the other hand, if, as we have argued and shown, such determination is a judicial matter, the division of governmental functions under the Constitution is such that Congress has no power to confer upon the Commissioner of Internal Revenue the right to make such determination, even though an appeal to the Board of Tax Appeals and then to the Circuit Court of Appeals be given the transferee.

In the *Routzahn* case the court criticizes the holding of the Board of Tax Appeals in the *Cappellini* case (14 B. T. A. 1269), to the effect that a transferee by appealing to the Board of Tax Appeals waives the right or is estopped to question the constitutionality of section 280, but it seems from the Supreme Court cases cited by the Board that its conclusion has pretty good support in the authorities. They certainly sustain the doctrine that a party may by his acts or omissions waive the right to raise a constitutional ques-

tion. And when the sole right of a tribunal to hear my complaint depends on a statute which I assert to be invalid, it sounds plausible to say that I waive the right to object to the statute by appealing to the tribunal.

Point F.

Criticism of the Opinion of the Circuit Court of Appeals in the Case at Bar.

The opinion of the Second Circuit Court of Appeals in the case at bar is predicated upon the opinion of the Sixth Circuit Court of Appeals in the case of *Routzahn* v. *Tyroler*, *supra*, and, therefore, our foregoing criticism of the latter case is applicable to the case at bar. More need not be said.

Point G.

The *Old Colony* Case Is Not in Point.

Old Colony Trust Co. v. *Commissioner*, 279 U. S. 716, 73 L. ed. 918, decided June 3, 1929, sustaining the right of the Circuit Court of Appeals to review decisions of the Board of Tax Appeals, has nothing whatsoever to do with the validity of section 280, since the suit did not involve a transferee. What was said in that case was undoubtedly limited to the rights and remedies of taxpayers, and has no application to the rights and remedies of a transferee of the properties of a taxpayer. The decision is of no value in the instant case.

Conclusion.

In view of the foregoing, we respectfully submit that under no view of the matter can section 280 of the Revenue Act of 1926 be held constitutional.

James C. Denton,
Richard H. Wills,
Counsel for Mid-Continent Petroleum Corporation, a Corporation, as Amici Curiae.

APPENDIX.

The report of the Conference Committee of the House and Senate (Report No. 356, 69th Congress, 1st Session) reporting the last amendment under which section 280 went into the final draft of the Revenue Act of 1926.

Quoting from above report (pages 42-44):

The Senate amendment added a new section, the House bill containing no corresponding provisions. The House recedes with an amendment which is a substitute for the Senate amendment. The substitute modifies the Senate amendment in the matter of interest and the statute of limitations for assessment of transferees. Further it omits certain unnecessary language of the Senate amendment that was merely explanatory and rephrases for purpose of clarification certain other language of the Senate amendment. As thus modified the provisions of the Senate amendment are summarized in the following paragraphs:

"The amendment covers a number of situations in which by reason of the fact that the assets of the taxpayer have been disposed of in whole or in part the government can not successfully distrain or otherwise collect the full amount of the tax originally returned or found due as a deficiency. For example:

"*(1)* Corporation A may distribute its assets to its shareholders and thereupon either dissolve or continue undissolved.

"*(2)* Corporation A may sell its assets to corporation B for a fair consideration either in cash or property or in stock of B. The proceeds are transmitted directly by corporation B to the shareholders of corporation A or indirectly to them through corporation A.

Corporation A thereupon either dissolves or continues undissolved.

"*(3)* Corporation A may reorganize into a partnership.

"*(4)* Corporation A may reorganize into corporation B by a mere change of name or state of incorporation or by an amendment of the financial provisions of its charter."

(Then follow other illustrations not material here.)

By reason of the trust fund doctrine and various state statutory provisions the transferee of assets of an insolvent transferor is ordinarily liable for the accrued and unpaid taxes of the transferor. The amount of such liability is not in excess of the assets received and the transferee has a right to recoupment against other transferees of the assets of the same taxpayer if the transferee is held liable in excess of his pro rata share of the tax liability of the transferor. Regardless of the insolvency the same doctrine applies in case of the transfer of assets of a taxpayer who has died since the transfer or in the case of a corporation that has since the transfer dissolved or otherwise terminated its existence without making adequate provision for tax liabilities. Proceedings against the transferee are ordinarily had in equity, though if the taxpayer is still in existence, an unsatisfied return of execution must be had against him and a creditor's bill brought to satisfy the judgment. *Swan Land & Cattle Co.* v. *Frank,* (148 U. S. 603).

Without in any way changing the extent of such liability of the transferee under existing law, the amendment enforces such liability (whether in respect to the tax as originally returned by the taxpayer or a deficiency therein)

in the same manner as liability for a tax deficiency is enforced; that is, notice by the commissioner to the transferee and opportunity either to pay and sue for refund or else to proceed before the Board of Tax Appeals, with review by the courts. Such a proceeding is in lieu of the present equity proceeding and is exclusive, save that, of course, in a proper case, a tax lien upon the assets arising prior to their transfer may be enforced against the transferee by distraint, or in case of real estate by a proceeding in equity. In the case where the taxpayer remains in existence after the transfer, an unsatisfied return of a distraint warrant, issued in pusuance of an assessment lawfully made after a deficiency letter has been mailed to the taxpayer, would suffice in lieu of an unsatisfied execution to establish the liability of the taxpayer.

In view of the above situation it will be seen that the amendment makes the procedure for the collection of the amount of the liability of transferees conform to the procedure for the collection of taxes. The amendment thereby substitutes the specialized and more expeditious procedure of the Board for that of the District Courts in equity and will develop through the Board a uniformity of precedents in lieu of the present rather vague principles of law governing the liability of a transferee for unpaid taxes of a transferor.

The pertinent portion of section 280 to which the committee's report above mentioned relates is as follows:

> SEC. 280 *(a)* The amounts of the following liabilities shall * * * be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title * * *.

(1) The liability at law or in equity of a transferee of property of a taxpayer * * *.

Report of the Joint Committee on Internal-Revenue Taxation.

In the Report of the Joint Committee on Internal-Revenue Taxation, which was submitted to Congress by Honorable William R. Green, Chairman of the Ways and Means Committee of the House of Representatives, on November 15, 1927, in connection with the proposed Revenue Act of 1928, then pending before Congress, the following statement appears on pages 15 and 16 of Volume I thereof:

> If a taxpayer transfers his property (other than a *bona fide* sale) and thus is unable to pay a proposed additional tax, it becomes necessary to proceed against the transferee, whose liability for the tax is based ordinarily on the so-called "trust fund" doctrine. Such transfers commonly occur in the everyday dissolution of corporations and distributions of estates, though occasionally property transfers are made for the specific purpose of evading payment of the tax.
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> Prior to the 1926 Act, collection procedure against the transferee (except where a lien had attached before the transfer) was by a suit at law or in equity in the Federal District Court. Though section 280 does not purport to change the transferee's liability, it does introduce a new method of collection. In effect the transferee is subjected to the same collection procedure as though he were the taxpayer. A deficiency letter is sent to him, he may appeal to the Board of Tax Appeals, collection may be enforced by distraint if he does not appeal, and he is subject to jeopardy assessments.
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> The constitutionality of the section has been questioned and a District Court in Kentucky has held it un-

constitutional. *(Owensboro Ditcher & Grader Co. v. Lucas,* 18 F. (2d) 796.) The case has been appealed.

Section 280 appears to be the exclusive remedy at the present time; that is, the commissioner no longer may proceed against transferees by suit in the lower Federal courts. The docket of the Board of Tax Appeals is congested. Moreover, in certain kinds of cases it seems desirable to permit the commissioner to bring suit in the Federal courts rather than to proceed under section 280. This is particularly desirable where the transfer was made in good faith and where the liability ought to be apportioned among many transferees. It is recommended that the procedure by suit be resorted to as an alternative method of collection.